STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 22, 2006
v	No. 260541 Wayne Circuit Court
KENNETH GREGORY STRAUSS, Defendant-Appellant.	LC No. 04-009056-01

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of obstruction of justice. The trial court sentenced defendant to one year in jail. Defendant appeals as of right. We affirm.

This case arose from allegations that defendant discouraged an employee from cooperating in a police investigation by making threatening remarks and subsequently firing the employee. On appeal, defendant asserts that he was denied his constitutional right to counsel and to be tried by an impartial jury of his peers. He further claims that there was insufficient evidence to bind him over to stand trial and to convict him.

I. Waiver of Counsel

This Court "review[s] for clear error the trial court's factual findings regarding a defendant's knowing and intelligent waiver of [the right to counsel]," however "the meaning of 'knowing and intelligent' is a question of law" which we review de novo. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004).

A criminal defendant's right to represent himself is guaranteed by the United States Constitution, US Const, Am VI, and the Michigan Constitution, Const 1963, art 1, sec 13 and statute, MCL 763.1. Upon a defendant's initial request to proceed in propria persona, the lower court must determine that: 1) the defendant's request is unequivocal; 2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation; and 3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. *People v Russell*, 471 Mich 182, 191-192; 684 NW2d 745 (2004). In addition, a trial court must satisfy the requirements of MCR 6.005(D), which provides:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first:
>
> > (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
> >
> > 2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer. MCR 6.005(D).

A trial court must substantially comply with the aforementioned substantive requirements before a waiver is valid. *People v Adkins,* 452 Mich 702, 720-721; 551 NW2d 108 (1996), overruled in part on other grounds by *People v Williams,* 470 Mich 634, 641 n 7; 683 NW2d 597 (2004).

In this case, we find that defendant gave a valid waiver of counsel at his arraignment on September 15, 2004, before Circuit Judge Gregory D. Bill. Judge Bill explained the charges and consequences, and confirmed that defendant understood both. Judge Bill explained that defendant had a right to appointed counsel, and reviewed the reasons why defendant ought to consider exercising that right even though he had repeatedly expressed the desire to represent himself. Judge Bill referred to generalities such as an attorney's training in the law, the rules of evidence, court rules, statutory law, and case law, and he described the value of counsel in specific instances such as drafting voir dire questions for jury selection and drafting jury instructions to submit to the court. He also advised defendant that standby counsel was available to assist defendant if he persisted in representing himself. Defendant noted that he had retained counsel in an advisory capacity, although he intended to represent himself at trial. Judge Bill was in thorough compliance with MCR 6.005(D).

However, prior to the arraignment, defendant also represented himself at a preliminary examination. Although the district judge did insist that standby counsel be present, the court otherwise failed during preliminary examination to obtain a knowing and intelligent waiver of counsel.

During the preliminary examination on August 25, 2004, this exchange took place between District Judge Tina Brooks and the parties:

> THE COURT: Mr. Strauss, is your attorney here?
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> MR. STRAUSS: No. I'm going to represent myself, your Honor.
>
> THE COURT: Did our defenders [sic] office leave?
>
> MS. LEICK [prosecutor]: Yes.
>
> THE COURT: He better not have. 'Cause I—I will let Mr. Strauth rep—Strauss represent himself, but I want an attorney sitting next to him that can give him

advice or counsel. 'Cause I'm not going to be overturned on an Exam. Do you understand what I'm saying?

MR. STRAUSS: [No verbal response.]

THE COURT: I don't care if you don't—I want somebody there to tell you—to give you advice and if you want to ask questions that's fine with me. But, um, the bottom line is I don't want you sitting when you have a case that you're looking at ten years in jail, fifteen years in jail. I want you to have somebody sitting there that can tell you. You—you are the ultimate decision maker, but then I at least want somebody that has a law school education or legal background to be able to advise you. Do you understand that?

MR. STRAUSS: I do.

THE COURT: Um, I know you may not be happy with that answer, and if—you don't have to listen to anything they say. But I would prefer—

MS. LEICK: Mr. Parker will be in, in a moment.

THE COURT: Thank you. You can have a seat right in that front chair. This is Mr. Strauss. Mr. Strauss wants to represent himself in this felony proceeding, which consists of Habitual Offender Notice, and it is one count of Interfering With A Crime Report—Committing Crime/Threatening to Kill or Injure, ten year, and Obstruction of Justice Second Offense Notice. I am allowing him to represent himself but only with you sitting by to aid and or assist, and or be as helpful as you possibly can. Although I did inform him that I appreciate and understand it is his right to represent himself and that he doesn't have to listen to whatever you say.

MR. PARKER: Certainly.

This conversation arguably meets the barest minimum of MCR 6.005(D), in that the judge did enumerate the charges and state that standby counsel would assist if needed. However, it is plainly not the kind of "colloquy advising the defendant of the dangers and disadvantages of self-representation" that is required to ensure a waiver is knowing and voluntary. *Russell, supra* at 191-192. The judge simply did not discuss with defendant the key issues, such as whether he understood the charges against him, the possible sentences, the risks of self-representation, a working knowledge of the rules of evidence and procedure. *Adkins, supra* at 708-712. The district judge stated that she did not want to be reversed for failure to ensure the waiver was voluntary and knowing, but she did not follow the proper process to avoid reversal.

However, we find that on the facts of this case, the failure to obtain a valid waiver of counsel at the preliminary examination was effectively cured by the defendant's valid waiver at arraignment and the subsequent fair trial. In reaching this conclusion, we note first that while the right to counsel is constitutionally guaranteed, the right to preliminary examination is not. *People v Hall*, 435 Mich 599, 603; 460 NW2d 520 (1990). Errors at the preliminary

examination stage will not result in reversal of a verdict rendered after a fair trial if the error is harmless. *Id.*

While the harmless error standard is generally inapplicable to a constitutional error related to the right to counsel at trial, our Supreme Court has found that the process for preliminary examination, a legislatively designed process, is not as exacting: "Although the United States Supreme Court has held that certain constitutional violations do require automatic reversal, see, e.g., *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) (denial of counsel at trial), '[It] is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations . . . .' *United States v Hasting*, 461 US 499, 509; 103 S Ct 1974; 76 L Ed 2d 96 (1983)." *Id.* at 604.

Although in *Hall* the issue was the improper admission of hearsay testimony during the preliminary examination, the Court's reasoning relied in part on case law from the United States Supreme Court related to rights at preliminary examinations, including a case involving waiver of counsel:

> The Supreme Court has recognized the viability of the harmless error principle even where fundamental constitutional rights of a defendant are involved at the preliminary examination. In *Coleman v Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1970), the Court held that because the preliminary hearing prior to indictment is a "'critical stage'" in the course of prosecution under Alabama law, the Sixth Amendment right to counsel attaches. However, instead of reversing the defendant's conviction, after finding that the right to counsel had been unconstitutionally denied, the Court remanded the case to the state courts for a determination of whether denial of counsel at the preliminary hearing was harmless error. [*Hall, supra* at 605-606.]

The Court reasoned that "[t]o require automatic reversal of an otherwise valid conviction for an error which is harmless constitutes an inexcusable waste of judicial resources and contorts the preliminary examination screening process so as to protect the guilty rather than the innocent," and we agree. *Id.* at 613.

We note that before the preliminary examination, defendant was charged with: one count of retaliating against a person for reporting a crime by threatening to kill or injure, punishable by ten years' imprisonment, MCL 750.483a(2)(b); one count of obstruction of justice, punishable by five years' imprisonment, MCL 750.505; and one habitual offender offense, MCL 769.10. At the preliminary examination, the ten year felony charge was dismissed, and defendant was tried only on the five year obstruction of justice charge. Judge Brooks explained that at the preliminary examination stage, her role was to determine whether there was probable cause to bind defendant over for trial on the charges enumerated; she noted that this determination was one of law only, and did not involve resolution of any questions of fact, and found that the prosecution had satisfied its burden of establishing probable cause as to the obstruction of justice charge. Upon review of the evidence presented, we find that the district judge correctly found there was probable cause. Given defendant's relative success at the preliminary examination, and the likelihood that the result would have been the same with counsel present, we find that defendant was not prejudiced by the court's failure to obtain a valid waiver of counsel at this stage in the proceeding.

We therefore find that any error at preliminary examination was cured by defendant's valid waiver of counsel during arraignment and the subsequent fair trial.

II. Sufficiency of Evidence

Defendant next argues that there was insufficient evidence to support his bindover and subsequent conviction.

We review a lower court's decision to bind over a defendant for an abuse of discretion. *People v Hamblin*, 224 Mich App 87, 91; 568 NW2d 339 (1997). To properly bind a defendant over for trial there must be evidence that a felony was committed and probable cause to believe that defendant committed it. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003). The evidence must present at least an inference to establish the elements of the crime charged. *Id*. However, errors or deficiencies in the bindover are harmless if sufficient evidence is presented at trial to convict defendant of the charge. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996). Because a review of the sufficiency of evidence at trial is therefore dispositive, we turn our inquiry to that first.

A challenge to the sufficiency of the evidence in a jury trial is viewed in a light most favorable to the prosecution. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). This Court must determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Id*. A reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Obstruction of justice is a common law offense generally understood as an interference with the orderly administration of justice. *People v Thomas*, 438 Mich 448, 455; 475 NW2d 288 (1991). It is not a single offense, but a category of offenses. *People v Jenkins*, 244 Mich App 1, 10; 624 NW2d 457 (2000). It includes willfully and corruptly hampering, obstructing, and interfering with a proper and legitimate criminal investigation. *People v Somma*, 123 Mich App 658, 662; 333 NW2d 117 (1983). It is the effort to thwart or impede the administration of justice and not the success of the endeavor that constitutes the crime. *Thomas*, *supra* at 455. Defendant was charged with threatening or otherwise attempting to discourage his employee from cooperating in a criminal investigation, firing or threatening them for reporting criminal activity. This falls within the offense of hampering, obstructing, and interfering with a legitimate criminal investigation.

Defendant argues that the evidence was insufficient because testimony from the primary witness in this case was inconsistent and unreliable. However, if the complaining witness is believed, her testimony alone would suffice to sustain a conviction. MCL 750.520(h); *People v Lemmon*, 456 Mich 625, 642;576 NW2d 129 (1998). This is an issue of credibility and, as such, is a question for the jury; this Court will not resolve credibility issues anew on appeal. *People v Milstead*, 250 Mich App 391, 406; 648 NW2d 648 (2002). The testimony about the threats, together with the fact that the both the witness and her husband were fired the day after cooperating with the police in an investigation surrounding defendant's brother's business, supported a reasonable inference that defendant was guilty of obstruction of justice. We note that defendant specifically told the witness that, if the underlying criminal matter did not "go to court," she may have her job back. On the facts presented to the jury, the evidence was

sufficient to sustain defendant's conviction. By affirming the conviction at trial, this Court necessarily concludes that defendant's bindover was also proper. *Dunham, supra.*

In reaching our conclusion, we find no merit in defendant's argument that he was denied the effective assistance of counsel at the hearing on his motion to quash. Defendant has not demonstrated that, but for any particular error by counsel, the outcome of his motion to quash would have been different. *People v Harmon,* 248 Mich App 522, 531; 640 NW2d 314 (2001).

III. Jury Selection

Defendant also argues that he was denied his constitutional right to be tried by a jury of his peers because the prosecution discriminatorily used a peremptory challenge to exclude a male from the jury.

The right to be tried by a jury of one's peers is a fundamental constitutional guarantee. To raise a *Batson*[1] objection to the prosecutor's use of a peremptory challenge, a defendant initially bears the burden of making a prima facie case of purposeful discrimination. *People v Barker*, 179 Mich App 702; 707; 446 NW2d 549 (1989), affirmed 437 Mich 161 (1991). A defendant establishes a prima facie case by showing relevant circumstances that raise an inference that the prosecutor exercised peremptory challenges to exclude venire persons based on gender. *Id*. The burden then shifts to the prosecutor to articulate a neutral explanation for excluding the challenged minority jurors. *Id*.

Here, fourteen prospective jurors were initially called during voir dire, twelve women and two men. Two females were subsequently excused, one for cause and one by a peremptory challenge from the prosecution. One male and one female replaced these jurors, so the pool at that point was eleven women and three men. The prosecution then used a peremptory challenge to eliminate one of the male jurors. It is noteworthy that this prospective juror, when asked whether he would be unfairly prejudiced against either the employer or employee in a case where threats were made against an employee, answered "maybe." The eliminated male juror was replaced by a female, and this group became the final jury, twelve females and two males. After the trial, two jurors were dismissed at random, one of whom was a male.

We find that nothing in the facts presented supports an inference that the prosecution purposefully engaged in gender discrimination. The final jury make-up exactly matched the initial pool of prospective jurors called. The prosecutor used two peremptory challenges, excusing one male and one female, and given the facts of the case, the challenge to the male juror appears reasonable to us.

[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

Defendant has failed to establish a prima facie case because the circumstances simply do not suggest that the prosecutor impermissibly used peremptory challenges to exclude jurors based on gender. Defendant was not denied his constitutional right to a fair trial by a jury of his peers.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper